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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RUBEN HERNANDEZ-HERNANDEZ,
aka Ruben Rodriguez

No. 05-10102

D.C. No. CR-04-00734-PHX-FJM

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Argued and submitted February 16, 2006
San Francisco, California

Before: ALARCÓN and McKEOWN, Circuit Judges, and HOLLAND,**
Senior District Judge.

Reuben Hernandez-Hernandez appeals his conviction and sentence for
unlawful reentry, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to

* This disposition is not appropriate for publication and may not be cited
to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable H. Russel Holland, Senior District Judge for the District
of Alaska, sitting by designation.

28 U.S.C. § 1291, and we affirm.

Appellant challenges his conviction on the ground that the district court erred in denying his Rule 29 motion. "We review a district court's denial of a Rule 29 motion for a judgment of acquittal de novo." United States v. Zavala-Mendez, 411 F.3d 1116, 1118 (9th Cir. 2005). "The question we must ask is whether . . . viewing the evidence in the light most favorable to the government, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Id. (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

The district court did not err in denying the Rule 29 motion. First, although the government did not establish that appellant had entered the United States on or about March 4, 2004, as alleged in the indictment, the government can "charge in the conjunctive and prove in the disjunctive." United States v. Ewain, 88 F.3d 689, 696 (9th Cir. 1996). Second, the government established that appellant had been discovered and identified by immigration officials on or about March 4, 2004, as needed for a conviction. Immigration officials were aware of appellant's physical presence on that day because he went into the office of U.S. Citizenship and Immigration Services and gave his correct name. Immigration officials also had some suspicion on March 4, 2004 that appellant was in the United States illegally because of a hit on the Interagency Border Inspection System. Viewing this

evidence in the light most favorable to the prosecution, a rational fact-finder could have concluded that appellant had been discovered and identified by immigration officials on or about March 4, 2004.

Appellant challenges his sentence on the ground that it violated his Sixth Amendment rights because the indictment did not allege and the jury did not find that his deportation was "subsequent to" his prior conviction for an aggravated felony as required by 8 U.S.C. § 1326(b)(2). We review appellant's Appendi claim de novo because appellant raised it below. United States v. Smith, 282 F.3d 758, 771 (9th Cir. 2002).

It is well-settled under Almendarez-Torres v. United States, 523 U.S. 224 (1998), and Appendi v. New Jersey, 530 U.S. 466 (2000), that the fact of a prior aggravated felony conviction for purposes of § 1326(b)(2) does not need to be alleged in an indictment, submitted to a jury, or proved beyond a reasonable doubt.

Appellant argues, however, that the temporal sequence between his deportation and his prior aggravated felony conviction is not encompassed within the Almendarez-Torres/Appendi exception. Appellant insists that this "fact" is "too far removed from the conclusive significance of a prior judicial record" and must be submitted to a jury. Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 1262 (2005). We disagree.

In order for the § 1326(b)(2) sentencing enhancement to apply, two dates must be established: 1) the date of the defendant's removal and 2) the date of his prior aggravated felony conviction. From those two dates, it can be determined whether the defendant's removal was subsequent to his conviction. Here, the date of appellant's removal was decided by the jury. Although the date of his prior aggravated felony was determined by the sentencing judge, this date is a fundamental element of the fact of the prior conviction and is the kind of fact that a judge can resolve. The sentence imposed on appellant by the district court did not violate appellant's Sixth Amendment rights.

AFFIRMED.